STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2003
v	No. 242725 Wayne Circuit Court
WILLIAM DREW, Defendant-Appellant.	LC No. 01-010894-01

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant, who was charged with first-degree murder, MCL 750.316, was convicted of second-degree murder, MCL 750.317, following a jury trial. He was sentenced as a fourth habitual offender, MCL 769.12, to 750 to 1,200 months' imprisonment. He appeals as of right. We affirm.

Defendant was convicted of murdering Hattie Cotton. In late August 2001, Cotton was expected to join other family members in Indiana to celebrate the upcoming Labor Day holiday. She never arrived. Back at her home in Detroit, on Labor Day, her neighbors smelled a noxious odor coming from her house. They believed it might be from garbage or dead rodents, but the smell did not go away when the garbage was moved.

Cotton was last seen outdoors around August 30. About a week later, the police received an anonymous 911 telephone call informing them that Cotton was dead in her home and that her decomposing body was wrapped up and infested with maggots.[1] At about 3:30 a.m. on September 7, 2001, the police came to Cotton's home. As they entered the home, there was an overwhelming smell. Cotton's decomposing body was found inside a bedroom closet, exactly as described in the telephone call to the police. Cotton was covered from head to toe with a blanket, and she could be seen only by peeling back the blanket.

[1] A tape of the 911 call was played for the jury but not transcribed into the record. The prosecutor described the detail provided in that tape during closing arguments. Defendant's voice was identified by neighbors Jerry and Barbara Porter as that of the caller.

One officer had to leave the house because the odor made him physically sick. He went several houses away, trying to get fresh air. While in the alley, he spotted defendant crouched between a dumpster and a garage, watching Cotton's home. Defendant was taken into custody at that time.

The medical examiner opined that Cotton had been killed by a blunt force trauma to her head, consistent with being hit by a pipe. The body was in an advanced state of decomposition.

Defendant had lived with Cotton and her disabled daughter at the home for about four months. Neighbors testified that defendant and Cotton frequently argued about money and defendant's lack of regular employment. The arguments increased in tenor and frequency as Labor Day weekend approached.

The home showed no signs of forced entry. Defendant was seen entering and leaving the home during Labor Day week, even though the noxious odor had already permeated the neighborhood and Cotton's bedroom window was infested with flies. While returning from a day job with the landlord, defendant asked to be dropped off a block from the home, saying that Cotton would be mad at him for coming home with beer. During the week, defendant was seen carting items out of the home and selling them.

I. Custodial Statement

While waiting at the scene in a police car, defendant stated that he considered himself to be at war with the police, that he wanted to kill police officers, and that a lot of people "should" be killed. Those statements were recorded by the car's video recorder. He also stated that Cotton's daughter should not have to see her mother "like that," implying that he already knew that Cotton was dead.

Defendant argues that the tape recording should have been excluded from trial on several grounds: (1) there was no probable cause for his arrest; (2) he had invoked his right to counsel; (3) the prosecution did not show that he was sober when he made the statements; (4) the prejudicial effect outweighed the probative value; and (5) the prosecutor attempted to use defendant's exercise of his right to remain silent against him. Defendant challenges only the admissibility of the taped statement and does not argue that a separate statement that he made before the taping commenced should have been excluded. In the untaped statement, defendant threatened a police officer, saying that he could find out where the officer's family lived. Defendant added, "I've killed before and I'll kill again."

Defendant concedes that he did not challenge the admissibility of the tape recording on several of the grounds now asserted. In a separate hearing during trial, defendant objected that the tape recording was not relevant under MRE 403, that it was improper evidence of other wrongful acts under MRE 404(b), that he was not advised of his *Miranda*[2] rights, and that the officer never ascertained whether he was drunk when he purportedly waived his rights.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

A. Probable Cause for Arrest

Defendant argues there was no probable cause to arrest him and, therefore, the recorded statement should never have been taken. Even if voluntary, a confession must be excluded from evidence if it resulted from a custodial interrogation following an illegal arrest and intervening events did not break the causal connection between the illegal arrest and the statement. *Taylor v Alabama*, 457 US 687, 690; 102 S Ct 2664; 73 L Ed 2d 314 (1982). Because this issue was not asserted below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We find no plain error because it is not clear or obvious that the police would not have been able to articulate a reasonable and particularized suspicion to detain defendant. The police were called to a house in response to a report of a dead body being found. Defendant was crouching behind a garbage dumpster near that house at around 3:30 a.m. While investigating the perimeter of a crime scene, the police are permitted to take suspicious persons into custody while the matter is investigated. See *People v Shields*, 200 Mich App 554, 556-557; 504 NW2d 711 (1993) (defendant was stopped as he attempted to move his car from in front of a drug house as it was being raided), and *People v Lewis*, 251 Mich App 58, 70; 649 NW2d 792 (2002) (nervous and evasive behavior can support a finding of articulable reasonable suspicion).

B. *Miranda* Issue

Defendant argues that the police did not cease interrogating him after he asserted his right to counsel. We review the entire record and make an independent determination about whether defendant's *Miranda* rights were violated. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998); *People v Shipley*, 256 Mich App 367, 372; 662 NW2d 856 (2003). We will affirm unless left with a definite and firm conviction that a mistake was made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). However, deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *Shipley*, *supra* at 372-373. Conversely, the trial court's application of constitutional standards is not entitled to deference. *People v Truong (After Remand)*, 218 Mich App 325, 334; 553 NW2d 692 (1996). Rather, questions of law are reviewed de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

Miranda warnings are not required unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384-392; 415 NW2d 193 (1987).

A police officer testified that he read defendant his *Miranda* rights. Defendant denied at the trial court level that he was advised of his rights, but he appears on appeal to concede that he was advised of his rights. When asked his name and address, defendant stated that he had nothing to say and wanted to speak with an attorney. There was no further questioning after that point. Despite this, defendant kept rambling and screaming obscenities. During his rambling diatribe, defendant stated that he wanted to kill police officers and asked questions about the investigation implying that he knew that Cotton's body had been found.

The circuit court accepted the officer's testimony that defendant was advised of his *Miranda* rights and that defendant continued to talk after asserting his right to counsel. The

court also found that the questions asked by the officers were not an attempt to elicit incriminating information. By initiating further discussion after asserting his right to counsel, defendant waived his previously invoked right. *People v Krause*, 206 Mich App 421, 424; 522 NW2d 667 (1994); *People v Myers*, 158 Mich App 1, 9-12; 404 NW2d 677 (1987). In addition, the types of identification or "booking" questions asked by the officers were not the type likely to elicit an incriminating response and, therefore, did not constitute interrogation. *People v Kowalski*, 230 Mich App 464, 479-481; 584 NW2d 613 (1998). The circuit court did not err when it rejected defendant's *Miranda* argument.

C. Intoxication

Defendant testified that he was drunk and under the influence of drugs when he was in the police car. He claimed that on the night he was arrested, he had consumed about a pint of gin and smoked "a joint" of marijuana and "about two dimes" of crack cocaine. Nonetheless, defendant was able to testify about his statements, giving precise information about topics discussed when the video recorder was turned down or off.

Intoxication from alcohol or other substances can affect the validity of a waiver of Fifth Amendment rights, but is not dispositive. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). The trial court found that it was not necessary that the police officer determine whether defendant was sober when making his statements and that the officer was being reasonable because he did not intend to interrogate defendant. We agree. Because defendant was not subjected to a custodial interrogation, *Miranda* warnings, although given here, were not required, *Hill*, *supra* at 384-392, and it is immaterial whether defendant was intoxicated when he blurted out the statements or continued speaking to the officers. Thus, we need not determine whether defendant's alleged "waiver" of his *Miranda* rights was voluntary or fueled by alcohol.

D. Undue Prejudice

Defendant argues that he preserved his argument that the probative value of the evidence was substantially outweighed by the prejudicial effect. We disagree. The only time defendant referred to "prejudice" was when he argued that he would be prejudiced by the introduction of "other acts" evidence under MRE 404(b) without advance notice by the prosecutor as required by MRE 404(b)(2):

> I was not provided with this [video recording] transcript until a week ago. The prosecutor–evidence was withheld from the defense. I'm not blaming Mr. Cameron [the trial prosecutor]. I'm just–from the Prosecutor's Office, evidence was withheld from the defense. It's prejudicial. If 404(b) comes into effect here that this was a bad act of making the statement, the Court could exclude it on that basis.

Defendant argued that the statements were not relevant, but he never argued that any probative value was substantially outweighed by any prejudicial effect:

> But based on 404–403, Rule 403, my contention is that the fact that he has some kind of private war against the police, it has nothing to do with the fact of whether or whether or [sic] not he killed Hattie Cotton. That's my whole point

> here. . . . [I]f the Court finds that the statements are irrelevant, we don't even have to get into the issue of *Miranda* . . . .

Accordingly, defendant did not preserve this argument, and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763. We find no plain error.

Weighing the relative probative value and prejudicial effect of evidence requires the flexible exercise of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 58-59; 614 NW2d 888 (2000). On this record, we cannot say that the trial court plainly abused that discretion by permitting the statements to be used, considering that they showed that defendant had prior knowledge that Cotton was dead.

E. Prosecutor's Use of Defendant's Silence

Defendant argues that the prosecutor impermissibly used his right to silence against him. This issue was not raised below, so our review is again limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763.

Defendant did not continue to exercise his right to remain silent. Instead, he kept cursing and rambling. We fail to see how the use of defendant's statements constitutes a violation of his right to remain silent.[3] Therefore, we find no plain error.

II. Sufficiency of the Evidence

Defendant next argues that there was insufficient evidence to prove that he caused Hattie Cotton's death. We must determine whether, when the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. See *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). Circumstantial evidence and reasonable inferences drawn therefrom may form the basis for conviction. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Mumford*, 60 Mich App 279, 283; 230 NW2d 395 (1975).

Viewing the evidence in a light most favorable to the prosecution, a rational jury could find the elements of the crime proven beyond a reasonable doubt. The strongest evidence was the time-line. Cotton was last seen alive on August 30, as she was finishing preparations for her Labor Day holiday trip. She was expected to spend the Labor Day holiday with relatives in Indiana, but never arrived.

Defendant was seen entering or leaving Cotton's home on Sunday, September 2; Tuesday, September 4; Wednesday, September 5; and Thursday, September 6. Neighbors started noticing the smell of death on Monday, September 3, and fly infestation was prominent on Wednesday, September 5. The decedent's body was discovered on September 7 in an advanced

[3] Defendant also raises this matter in an issue addressing the prosecutor's conduct. For the same reasons, we reject the argument that the prosecutor's comments referring to defendant's statements during closing argument denigrated defendant's right to remain silent.

state of decomposition. Strong circumstantial evidence supports an inference that Cotton was prevented from going to Indiana and that she was killed within the time frame between August 30 and September 2.

There were no signs of forced entry into Cotton's home, and defendant had keys to the home. The odor and flies were so prominent that the jury could infer that defendant was not unaware that a corpse was rotting in the home when he came and went during the week. Yet, while all indications led the neighbors to suspect "something" had died, defendant pretended that Cotton was still alive, telling the landlord that he should drop defendant off a block away from the home because Cotton would object to him coming home with beer. As Cotton's body lay decomposing in the closet, defendant pretended that all was normal until anonymously placing the "911" call on Thursday, September 6.

Motive is not necessarily an element of murder but is always relevant. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). Defendant and the victim had been heard arguing over financial and employment matters with increasing frequency as the apparent date of the victim's death neared.

Although circumstantial, the evidence, viewed most favorably to the prosecution, was sufficient to support defendant's conviction.

III. Prosecutor's Conduct

Defendant argues that the prosecutor committed misconduct that deprived him of his right to a fair trial. This Court reviews claims of prosecutorial misconduct on a case-by-case basis and reviews the record as a whole to determine whether the defendant was denied a fair trial. See *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Because defendant did not object to the prosecutor's conduct, we review these unpreserved matters for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

A. Opening Statement

In opening statement, the prosecutor characterized the deceased's adult daughter as a "32 year old woman, mentally challenged, intellect of a five year old." Defendant argues that the prosecutor did not have a good-faith basis to make that statement, because no evidence about her intellect level was introduced at trial. See, e.g., *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991).

The victim's daughter was alternately described by witnesses as "mentally challenged" and probably autistic. She seldom talked, and when she did she made no sense to outsiders. According to her brother, if she testified in court, no one would understand her, but he could interpret. She never went anywhere without her mother, and her mother never went anywhere without her. Although there was no evidence that the daughter actually had the intellect of a five-year-old child, in light of the testimony about her condition, defendant has failed to show that the prosecutor's representation of the daughter's intellect level was not made in good faith, nor has he shown any prejudice from that single detail where the body of evidence overwhelmingly demonstrated that the daughter suffered a severe impairment. See, e.g., *id.*

Defendant also argues that the prosecutor erroneously stated in opening statement that defendant was found "hiding behind some Dumpsters" when, in fact, officers who found him testified that he was "lurking . . . *almost* as if he was hiding" in the alley (emphasis added). Because the difference between the prosecutor's statement and the officers' testimony is so minor, defendant has failed to demonstrate that the prosecutor did not have a good-faith basis for suggesting these proofs in his opening statement. See *id.*

B. Closing Argument

Defendant argues that the prosecutor "gave unsworn inflammatory testimony not supported by the record to the effect that William Drew was a crack addict who had stripped the apartment of 'everything that's not nailed down for the poison he needs.'" We disagree. The prosecutor did not state that defendant was a crack addict. At trial, defendant conceded during the discussion of jury instructions that the prosecution's theory was that defendant's motive was theft. During closing argument, the prosecutor repeatedly referred to fights about money and the manner in which defendant apparently sold the contents of Cotton's home. The prosecutor referred in closing arguments to crack cocaine on one occasion, but it did not implicate defendant:

> Where does he go with that plastic bag? Does he go where you drop off the trash between the sidewalk and the curb? No. He walks right across the street. He walks down an alley. *Where does he go in that alley? I don't know, but he was headed that way. If you turn left, what there? Gas station. Turn right, what's there? Crack house.*
>
> Next witness, Viola Turner. *Did you ever see him at that gas station before? Sure did.* He had a plastic bag selling women's clothes. Can you think of anything more despicable?
>
> This man took this pipe and bludgeoned Hattie [Cotton] to death. He strips the place out, getting everything that's not nailed down for the poison he needs. [Emphasis added.]

The prosecutor conceded that he did not know where defendant went, but elicited from a witness, and then highlighted during closing argument, that defendant had been seen at the *gas station*. Moreover, there is nothing indicating that the prosecutor was referring to crack cocaine when he referred to the "poison" defendant needed. In any event, the jury was instructed that the arguments of counsel were not evidence. We therefore conclude that the prosecutor's ambiguous reference to "poison" did not amount to plain error requiring reversal.

C. Rebuttal Closing Argument

Defendant argues that the prosecutor committed misconduct by denigrating defense counsel in closing argument. A prosecutor may not personally attack defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW 2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury, *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). At trial, the prosecutor argued:

> Ladies and gentlemen, you have a benefit the defense attorney doesn't have. He has an obligation to represent the interest of his client to the best of his ability, and he has. He has. You can't fault him for that. But you have the benefit of determining the truth. You don't have any agenda. You don't have any motive. You can sit back, weigh the credibility of the witnesses and determine truth. That's a luxury.

These comments came immediately after the prosecutor had criticized defense counsel's argument, characterizing it as an implausible collection of inconsistent defenses:

> I think it's interesting that the defense spends approximately–I counted about six minutes talking about at best, the defendant, all I've been able to show is murder in the second degree. And then after six minutes, he steps to the side and says, well, really, he didn't show anything. It's not my client. Does that make any sense? I mean, for those of you who have children, and if your child said, you know what, I didn't go outside and play in the mud, but if I did play in the mud, it was my other brother's fault, how do you weigh that credibility? You'd throw it all out. You've got to be kidding me. You're trying to tell me you didn't go outside and play in the mud, and then in the same–out of the other side of your mouth, you're saying but if I did, it was somebody else's fault? Does that make any sense to you?

Viewed in context, we conclude that the prosecutor's argument was fair comment upon inconsistent defenses and did not improperly denigrate defense counsel. See, generally, *People v Knowles*, 256 Mich App 53, 60-61; 662 NW2d 824 (2003).

Defendant also argues that the prosecutor somehow improperly shifted the burden of proof when he stated that "I was waiting to hear about the video. But there's such an important statement I didn't mention when we were talking about the video. I've killed before and I'll kill again." Defendant fails to demonstrate how that statement shifted the burden of proof or implied that he was obligated to prove anything. See *People v Fields*, 450 Mich 94, 112-115; 538 NW2d 356 (1995). Plain error has not been shown.

IV. Effective Assistance of Counsel

Finally, defendant argues that he was denied the effective assistance of counsel because his trial attorney failed to object to the prosecutor's arguments as discussed in part III, and failed to challenge whether there was probable cause for his arrest as discussed in part I(A).

A defendant must make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), unless the details of the alleged deficiency are apparent on the existing record, *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

As previously discussed, there is no plain error apparent from the record with regard to the unpreserved substantive issues raised by defendant on appeal. Therefore, defendant has not shown that trial counsel's performance was so deficient that it denied him the effective assistance

of counsel. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Affirmed.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter